Supreme Court, U. S.
FILED
MAR 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1325

SUE CLARK,

Appellant,

vs.

STATE OF INDIANA and LAKE COUNTY PROSECUTOR,

Appellees.

On Appeal from the Supreme Court of Indiana

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellees, the State of Indiana and the Prosecuting Attorney of the 31st Judicial Circuit of Indiana (Lake County Prosecutor), respectfully move this Court to dismiss this appeal or affirm the judgment of the Supreme Court of Indiana entered by that Court in cause number 978 S 193 on December 3, 1979.

OPINIONS BELOW

The Opinion of the Supreme Court of Indiana appears at 397 N.E.2d 580. That opinion, two dissenting opinions by justices of that court, and the written judgment of the

trial court which originally had jurisdiction (Lake Superior Court, Civil Division, Room No. 3, Gary, Indiana), are appended to the Appellant's Jurisdictional Statement.

JURISDICTION

Appellant alleges that the jurisdiction of the Supreme Court of the United States to review the judgment of the Supreme Court of Indiana on appeal in this case is conferred by Title 28, United States Code, Section 1257(2). However, the appellees would assert that there is no jurisdiction in this court to review this case on appeal since there is no substantial federal question involved, and since the decision appealed from rests sufficiently on state grounds.

QUESTIONS PRESENTED BY THE APPEAL

The Appellees would assert that the issues presented in this appeal are:

1. Whether the Appellant has properly presented to this Court a federal question of substance.

2. Whether Appellant has the necessary standing to raise an overbreadth challenge to the constitutionality of a statute of Indiana, namely, a section of the Indiana Code, cited as IC 35-45-4-1.

Appellants have alleged that there is a federal question in their assertion that a portion of said statute, IC 35-45-4-1(a)(3), which prohibits a person from appearing nude in a public place, is in conflict with the free speech clause of the First Amendment to The Constitution of the United States as applied to the State by the Fourteenth Amendment, due to the alleged facial overbreadth of the statute.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellants have alleged the involvement of the following provisions of the Constitution of the United States:

> Amendments, Article One:
>
> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> Amendments, Article Fourteen:
>
> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "* * * "

Indiana Code, Section 35-45-4-1(a)(3) is in issue. The full text of the Statute is as follows:

> 35-45-4-1. [Public indecency]—(a) A person who knowingly or intentionally, in a public place:
>
> (1) Engages in sexual intercourse;
>
> (2) Engages in deviate sexual conduct;
>
> (3) Appears in a state of nudity; or
>
> (4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with

less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

A class A misdemeanor in Indiana carries a penalty of a term of imprisonment fixed at from one day to one year to which in addition may be added a fine of not more than $5,000.00. Indiana Code 35-50-3-2.

STATEMENT OF THE CASE

I.

Nature of the Case

This appeal, filed by Plaintiff below, arises from a consolidated case wherein the Supreme Court of Indiana upheld the validity of IC 35-45-4-1(a)(3), facially and as applied, thereby reversing the trial court cases which were appealed to that Court by the State of Indiana; among these cases is the sole case brought to this Court by this direct appeal. The trial court case was commenced by Appellant Sue Clark's filing, on November 17, 1977, a Complaint for Declaratory Judgment in the Lake Superior Court, Civil Division Room 3. The complaint challenged the constitutionality of IC 35-45-4-1(a)(3).

II.

Course of the Proceedings below

As stated immediately above, the original Complaint for Declaratory Judgment was filed in the Lake Superior Court on November 17, 1977 against the State of Indiana, seeking to have the Statute IC 35-45-4-1(a)(3) declared unconstitutional. On November 28, 1977, Plaintiff filed an

Amended Complaint for Declaratory Judgment, joining the local Prosecuting Attorney as a party defendant.

The Prosecutor of the 31st Judicial Circuit (the "Lake County Prosecutor") filed a Motion for Judgment on the Pleadings and the State of Indiana by the Attorney General of Indiana filed a Motion to Dismiss. Both were denied.

A short evidentiary hearing was held on February 24, 1978, after which the two prior motions were renewed.

The trial court entered judgment against defendants on May 9, 1978. That Judgment and Decree are printed in Appendix B of the Appellant's Jurisdictional Statement. A Motion to Correct Errors was timely filed in Lake Superior Court on June 12, 1978 by defendants, and was denied on June 22, 1978.

Since Indiana's Appellate Rule 4 (A) (8) gives exclusive jurisdiction to its Supreme Court in appeals from judgments declaring state statutes to be unconstitutional, an appeal was made to that court, which docketed it under the number 978 S193. This was consolidated by the Indiana Supreme Court with two others: *State of Indiana v. Connie Sue Baysinger, et al.*, No. 1078 S202, which in itself was a consolidation of eleven trial cases in which appellees were charged with violating IC 35-45-4-1 and filed motions to dismiss raising constitutionality of that statute, all of said 11 cases originating in the Allen Superior Court; and *City of South Bend, et al., v. Kitty Kat Lounge, Inc.*, No. 1078 S227, in which the plaintiff sought and obtained injunctive relief to prevent the city from continuing to order the Lounge to stop providing nude entertainment on the grounds that IC 35-45-4-1 was unconstitutional. This last action originated from the St. Joseph Superior Court.

These cases were decided in favor of the constitutionality of IC 35-45-4-1 by the Indiana Supreme Court on December

3, 1979. That decision, and two dissenting opinions, are printed as Appendix A to Appellant's "Jurisdictional Statement", and are reported under the name *State v. Baysinger,* — Ind. —, 397 N.E.2d 580 (1979).

This appeal followed, and is brought by Sue Clark alone. Hence, only the record in No. 978 S193 should be considered herein.

III.

Facts relevant to the Issues presented for Review

Since this case originated as a complaint for declaratory judgment, the facts were not substantially in dispute.

Appellant testified that she was employed as a dancer in the Scuttle-Butt Lounge in Gary, Indiana, a place selling alcoholic beverages, and that prior to October 1, 1977, she performed about the last ten minutes of her 28-minute dance routine in the nude and on the floor of the stage (that is, not on her feet). There were no vocal remarks in her routine. October 1, 1977 was the effective date of IC 35-45-4-1, which at the same time repealed IC 35-1-83-3, a prior public indecency statute prohibiting, among other things, "an indecent exposure of his or her person in a public place". Although the performances occurred on an elevated stage, the Appellant was only about five feet from the nearest patron.

After October 1, 1977, Plaintiff continued her employment as a dancer, modifying her costuming so that she no longer appeared totally nude, and she alleges that she suffered a loss of some income as a result of the elimination of nudity from her routine.

The record shows, and the opinion of the Indiana Supreme Court reflects, that plaintiff made no allegation of any sort of "speech" or any expressive content to her

dancing, either when she was naked or somewhat clothed, and made no attempt at trial to attribute any communicative or expressive value to her act.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

1. Appellant does not present to this Court a Federal Question of Substance, aside from Allegations of Overbreadth.

This Court has scrupulously adhered to the rule that it will not review judgments of state courts which rest upon non-federal or independent state grounds sufficient to support the judgment. *Henry v. Mississippi,* 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 242 (1965); *Herb v. Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789, supp.op. 325 U.S. 77, 65 S.Ct. 954, 89 L.Ed. 1483, reh. den. 325 U.S. 893, 65 S.Ct. 1188, 89 L.Ed. 2005 (1945).

The state court opinion appealed from herein addressed two main issues: Whether the statute is vague, and whether the statute is overbroad in that it, while properly embracing and regulating appellant's own actions, sweeps too broadly and regulates impermissibly other conduct which is protected against such regulation.

Appellees would assert that both main issues were decided on non-Federal grounds.

The vagueness argument rested on the use of the term "public place", not specifically defined in IC 35-45-4-1, as the definition of the places where the conduct proscribed by the statute is punishable. The Indiana Supreme Court found that in Indiana law the basis for the offense of public indecency has been consistent in state law and that "public" in this context clearly meant, in Indiana law, "any place accessible to the public"; that is, any place

where the public is invited and are free to go upon special or implied invitation—a place available to all or a certain segment of the public." *State of Indiana v. Baysinger,* — Ind. —, 397 N.E.2d 580 (1979), citing *Peachey v. Boswell,* 240 Ind. 604, 167 N.E.2d 48, 56-57 (1960). Clearly, the Court's finding of no impermissible vagueness in IC 35-45-4-1 rests on purely State law, and cannot be a subject of appellate review in this action.

The remaining issue in the Indiana Supreme Court decision was whether the statute is overbroad in that its sweep extended impermissibly into realms of speech protected by the First Amendment of the Constitution of the United States.

The opinion being appealed from makes it clear that public indecency has long been punishable in Indiana, always including within its prohibition nudity in a public place. *McJunkins and Others v. The State of Indiana,* 10 Ind. 140, 145 (1858); *Ardery v. State of Indiana,* 56 Ind. 328 (1877). The current statute has been on the books only since 1977 because of a general recodification of the criminal law of the State of Indiana occurring that year.

The offense of public indecency was thought to be a crime at common law. *Yauch v. City of Tucson,* 514 P.2d 709, 710 (Ariz., 1973); *Starshock, Inc. v. Shusted,* 370 F.Supp. 506, 508 (1974); *Hoffman v. Carson,* 250 So.2d 891, 49 A.L.R.3d 1078 (Fla., 1971), app. dism'd 404 U.S. 981, 92 S.Ct. 453, 30 L.Ed.2d 365 (1971). Because of the relationship to the public welfare of exposing sexual organs and nudity, regulation or prohibition thereof has been held to be within the police power of the State Legislature. *Hoffman, supra; Starshock, Inc., supra; Wayside Restaurant, Inc. v. City of Virginia Beach,* 208 S.E.2d 51, 53 (Va., 1974); *State of Ohio ex rel. Church v. Brown,* 133 N.E.2d 333,

(Ohio, 1956), app. dism'd 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed. 2d 82.

This Court recognized that the State may regulate public nudity when, in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607 at 2615-2616, 37 L.Ed.2d 419 (1973), it said, "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation *any more than live sex and nudity can be exhibited without limit in public places.*" (emphasis added); lewd public conduct itself is within the permissible bounds of state regulation, even if a verbal description of it might in some circumstances be protected. *Miller, supra,* 413 U.S., at 26 n. 8, 93 S.Ct. 2607, 37 L.Ed.2d 419.

The Court reiterated the point later in *Erzoznik v. City of Jacksonville,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975):

> "Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. . . . In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent exposure laws. . . . ('No one would suggest that the First Amendment permits nudity in a public place'). (citations omitted.) *Id.* at 211, 95 S.Ct. at 2273, n. 7"

The *Miller* and *Erzoznik* cases thus, in a context which has bearing on the instant case, clearly distinguish statutes which, like IC 35-45-4-1, are directed at conduct instead of speech, from obscenity statutes, which are directed at speech itself. The ability to legislate against conduct exists even when directly exercised against actions which do have some degree of expressive value. *United States v. O'Brien, post.* (It should be remembered that Appellant herein does not even allege that there is any expressive content to the nudity in her dance, or indeed to the dance itself.)

The leading case of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), would allow state regulation of conduct even ". . . when 'speech' and 'non-speech' elements are combined in the same course of conduct"; a "sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on the First Amendment." *id.* at 367, 88 S.Ct. at 1678. (*O'Brien,* of course, involved a symbolic protest against a broad range of governmental policies connected with war and military draft registration, and thus a rather serious expressive content.)

The argument against granting the appeal can be summarized as follows: (1) The State's power to regulate public nudity is long-standing and is a valid exercise of the police power; (2) it serves an important governmental interest in order, decency, morality, and public welfare. (3) Public indecency statutes prohibiting public nudity, including IC 35-45-4-1, are directed against conduct only, and not against any kind of speech. (4) Injury to protected speech, if any, is incidental and insubstantial when compared to the legitimate sweep of the statute. (5). There is, therefore, no "right", federally-protected or otherwise, to go naked in a public place, free of the strictures of such public indecency statutes. (6) There is no vagueness issue cognizable in this action concerning Indiana's definition of "public place" because the vagueness allegation raised in this cause has already been settled by the state courts on all-state grounds. (7) Appellant has alleged the existence of no attempt at expression in the course of the enterprise which habitually included public nudity prior to the enactment of IC 35-45-4-1. (8). Appellant's nude dance conduct thus included no federally-protected right and the State's regulation of her costuming could not have affected

any personal federally-protected right. (9) Therefore, no substantial federal question has been raised herein, and the appeal ought to be dismissed or judgment affirmed.

Against this argument, supported as it is by the authorities given above, Appellant alleges a "right" to dance nude in public, which she apparently bases on just two cases, *California v. LaRue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972); and *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

LaRue, of course, *upheld* California's ability to prohibit nude barroom dancing, which is precisely the conduct Appellant was engaged in. The majority opinion in that case held *both* that the Twenty-First Amendment conferred ". . . something more than the normal state authority over public health, welfare and morals . . ." when in connection with regulation of the alcoholic beverage trade, *and* that ". . . the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power . . ." 401 U.S. at 114, 93 S.Ct. at 395. *LaRue,* therefore, does not stand for the proposition that a State cannot enact a general ban on public nudity aside from on "licensed premises". It is more accurate to characterize *LaRue* by saying that the State has a great deal of power to legislate concerning public indecency, which is only strengthened by the operation of the Twenty-First Amendment.

The *Doran* case should not have been cited for any substantive proposition regarding nudity. It was interlocutory only, and in essence held merely that since there might exist a set of facts in which nude dancing might contain protected expression, a Federal District Court Judge could not as a matter of law be said to have violated his discre-

tion in enjoining enforcement of an anti-nudity statute. This Court explicitly stated in *Doran* that its refusal to rule against the lower court's grant of interim relief was limited to its upholding of judicial discretion, and expressed no view as to the merits of the contentions of the respondent, who was the proponent of the "right" to nude public dancing. 422 U.S. at 933, 95 S.Ct. at 2569.

Subsequent cases have adopted, or at least supported, the above view of the *Doran* case. The Supreme Judicial Court of Maine noted that in *Doran*, this Court held, at most, ". . . that 'the customary "barroom" type of nude dancing' *may involve* only the barest minimum of protected expression." *Gabriel v. Town of Old Orchard Beach,* 390 A.2d 1065 at 1069 (Me., 1978). Emphasis of the court's. In *Kew v. Senter*, 416 F.Supp. 1191 (U.S.D.C.No.D. Tex., 1976), the court took due note of *Doran* and held nevertheless that the Texas statute therein was, ". . . primarily, if not exclusively, directed at nonverbal, physical conduct, an activity which Texas has greater constitutional power to regulate than speech in general . . ." *id.* at 1104.

It is entirely clear, therefore, that on the facts in this appeal, there is no substantial federal question.

2. Appellant does not have necessary standing to raise an overbreadth challenge to IC 35-45-4-1.

It is a basic constraint to challenges to statutes that a person must not raise or argue the constitutional rights of others. Constitutional rights are personal, and courts normally consider allegations of unconstitutionality only in light of the particular facts brought forth by the plaintiff. *Broadrick v. Oklahoma,* 413 U.S. 60, 93 S.Ct. 2908, 37 L.Ed. 2d 830 (1973). This proposition, if there were not an exception, would end our discussion here since appellant brought forth no such facts, alleging a curtailment of any expression

in her dance, and failed to establish a right to engage in commercial nude barroom dancing. When the constitutional challenge does not factually apply to the litigant, the overbreadth exception may permit the challenge if the overbreadth extends to the area of free speech and the case involves a statute's facial invalidity. However, this exception is carefully limited. It does not apply if a statute marginally infringing upon a third-person's First Amendment rights as a whole does cover a range of easily identifiable and properly prohibited conduct. *U.S. Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 458, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973). Another limitation to the facial overbreadth exception exists if conduct as well as speech is involved, and where, although the overbreadth to others may be real, such overbreadth is not substantial, judged in relation to the statute's plainly legitimate sweep. In *Broadrick v. Oklahoma, supra,* this Court stated:

> ". . . But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protective speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. (citation omitted) To put the matter another way, particularly where conduct

and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

Broadrick, id. at 615, 93 S.Ct. at 2917-18, 37 L.Ed.2d at 842.

Case law has plainly established that public nudity is conduct, not speech. The overbreadth adjudication exception has therefore been attenuated, to an extent that the conduct of public nudity, even if expressive, is within the scope of legitimate state controls and is justified for the reasons given in *Broadrick, supra.*

In *Kew v. Senter,* 416 F.Supp. 1101 (U.S.D.C.No.D. Texas, 1976), decided after *Doran,* the statutes involved were Texas Penal Code sections 21.08 (Indecent exposure) and 42.01 (Disorderly conduct). The kernel of both statutes was exposure of the anus or genitals in a public place, coupled with some specific intent or recklessness about offending others. The *Kew* court recognized that the statutes were directed primarily, "if not exclusively" at physical conduct, ". . . an activity which Texas has greater constitutional power to regulate than speech in general—even speech depicting or describing the same subject." (citing *Miller, supra*). 416 F.Supp. 1104. The *Kew* court went on:

> "In light of this recognition, plaintiff's challenge to the statutes for facial overbreadth is not compelling. It may be that one or more of the statutes in question could be applied to punish other conduct arguably protected by the First Amendment, such as application of Section 42.01(a)(10) to a nude ballet; but where the behavior condemned falls so far down the scale toward conduct as that treated by these statutes and so far from 'pure speech', overbreadth analysis becomes quite restricted. (Citing *Broadrick*) At this point on the speech-conduct spectrum,

> a conclusion that any of these statutes is facially overbroad would require a conclusion on our part that the amount of protected activity embraced by it is 'substantial . . . judged in relation to the statute's plainly legitimate sweep.' (citation omitted) This we are unable to do as to any of the statutes attacked."

Kew v. Senter, id.

The Indiana Supreme Court has decided this case in accordance with the principles of overbreadth litigation as enunciated by this Court in *Broadrick, supra*; it reached the same result as the Federal District Court in *Kew.*

Since plaintiff-appellant's conduct is unarguably within the power of the state to regulate (*LaRue, supra*), and the regulation itself is directed at a whole range of non-speech conduct amounting to public indecency and has but an incidental or insubstantial effect on arguably protected speech when compared to its legitimate sweep, and is, moreover, plainly an exercise of legitimate police powers of the Legislature, the plaintiff has no standing to urge the First Amendment overbreadth exception. Having already failed to establish any *personal* infringement of a federally protected right (part one, *supra*), plaintiff-appellant also fails properly to raise the First Amendment issue on overbreadth grounds. It must therefore be concluded that plaintiff has failed to raise any substantial federal question, and this appeal should therefore be dismissed and the judgment of the state supreme court affirmed.

CONCLUSION

For these reasons, Appellees respectfully move the Court to dismiss the appeal and affirm the judgment of the Indiana Supreme Court.

Respectfully Submitted,

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